48702-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN NICKERSON, JR.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,
GOVERNOR JAY INSLEE,
WASHINGTON ATTORNEY GENERAL BOB FERGUSON,
CAROL NELSON, Director of
Washington State Department of Revenue,
et al.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR THURSTON COUNTY,

The Honorable Carol Murphy, Judge

BRIEF OF APPELLANT

LENELL NUSSBAUM
2125 Western Ave., Suite 330
Seattle, WA 98121
(206) 728-0996

DOUGLAS HIATT
119 1st Ave. S., Suite 260
Seattle, WA 98104
(206) 412-8807

Attorneys for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and applied the incorrect legal standard to conclude the federal Controlled Substances Act does not pre-empt the Washington Medical Use of Cannabis Act (MUCA), RCW Chapter 69.51A, so as to preclude the State from allowing and taxing medical marijuana collective gardens. U.S. Constitution, Article VI.

2. The trial court erred by concluding the excise and business tax system the State imposes specifically on medical marijuana collective gardens, which requires the owner of a collective garden to report its gross proceeds from medical marijuana, and which reports must be made available to law enforcement and to the United States Department of Justice, does not compel a person to provide incriminating evidence in violation of the United States Constitution, Amendment V, and Constitution, Art. I, § 9.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the federal Controlled Substances Act, 21 U.S.C. § 801-904, under the Supremacy Clause pre-empt Washington state law regarding medical marijuana collective gardens so as to

preclude the State from permitting and taxing them as businesses?

2. Do the protections against self-incrimination of the Fifth Amendment and Art. I, § 9, provide a defense against assessments of sales and business and occupational taxes for collective gardens providing medical marijuana to qualifying patients, when the State also is prosecuting that individual for criminally delivering marijuana?

B. STATEMENT OF THE CASE

1. BACKGROUND OF CONTROLLED SUBSTANCES ACT

> Shortly after taking office in 1969, President Nixon declared a national 'war on drugs.' As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs. That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236.

Gonzales v. Raich, 545 U.S. 1, 10, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

> Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C.. §§ 841(a)(1), 844(a).

Raich, 545 U.S. at 14.

The CSA classifies every drug and medication in the country, tightly regulating its production, distribution, and use.

> The CSA categorizes all controlled substances into five schedules. [21 U.S.C.] § 812. The CSA's restrictions on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug has been placed. *Id.* at §§ 821-29. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. *Id.* at §§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. *Id.* at §§ 821-30.
>
> Since Congress enacted the CSA in 1970, marijuana and tetrahydrocannabinols have been classified as Schedule I controlled substances.[1] Schedule I drugs are deemed to have "a high potential for abuse," "no currently accepted medical use in treatment in the United States" and "a lack of accepted safety for use ... under medical supervision." 21 U.S.C. § 812(b)(1)(A)-(C). **By classifying marijuana as a Schedule I drug, Congress mandated that the manufacture, distribution, or possession of marijuana be a criminal offense.**[2]

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[1] *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 4 Stat. 1249 (Schedule I(c)(10) and (17)); 21 U.S.C. § 812(c) (Schedule I(c)(10) and (17)).

[2] The sole exception is use of the drug as part of a federally approved research study. 21 U.S.C. §§ 823, 841(a)(1), 844(a).

United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 489-90, 492, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) (emphasis added).

> Congress classified a host of substances when it enacted the CSA, but the statute permits the Attorney General to add, remove, or reschedule substances. He [sic] may do so, however, only after making particular findings, and on scientific and medical matters he is required to accept the findings of the Secretary of Health and Human Services.

Gonzales v. Oregon, 546 U.S. 243, 250, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006).

Congress classified marijuana, as well as heroin, LSD, and other drugs, under Schedule I: having a high potential for abuse, no currently accepted medical use in treatment, and no accepted safety for use under medical supervision. 21 U.S.C. § 812(b), (c).

> Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.

Raich, at 15.

2. BACKGROUND OF MEDICAL MARIJUANA IN WASHINGTON

a. *Controlled Substances Act*

In 1971, the Washington Legislature enacted the Uniform Controlled Substances Act, RCW chapter 69.50. Like the CSA, this statute makes it a crime

to manufacture, deliver, and possess marijuana. RCW 69.50.401-.445. *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 222-23, 351 P.3d 1515 (2015).

b. *Medical Use of Cannabis Act*

In 1998, the People of the State of Washington passed Initiative 692 to provide protections for medical marijuana use -- the Medical Use of Cannabis Act (MUCA). LAWS OF 1999, ch. 2; *Cannabis Action Coal.*, 183 Wn.2d at 223.

The Legislature amended MUCA in 2011 in an effort to create a state regulatory system for medical cannabis. First read in the Legislature February 25, 2011, the House passed it April 11, and the Senate passed it April 21, 2011. Engrossed Second Substitute Senate Bill (ESSSB) 5073 (2011).

i. *Vetoed Amendments*

ESSSB 5073 provided the state would license an industry of producers, processors and dispensers to wholesale and retail medical marijuana. ESSSB 5073, § 201(8),[3] §§ 701-703.[4] Sections 901-902

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[3] "(8) 'Dispense' means the selection, measuring, packaging, labeling, delivery, or retail sale of cannabis by a licensed dispenser to a qualifying patient or designated provider." *See also* ESSSB 5073, § 412 (referring to "proceeds of

required the Departments of Health and Agriculture to create and maintain a "secure and confidential" registration system, greatly restricting the release of any personally identifiable information to law enforcement.[5]

The Legislature acknowledged unregulated cannabis producers and dispensaries already existed. It offered an affirmative defense until its licensing system was established, so long as they met conditions, including they "be registered with the secretary of state as of May 1, 2011." ESSSB 5073 § 1201(3)(c).[6]

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sales of cannabis for medical use made by licensed producers, licensed processors of cannabis products, or licensed dispensers"); §§ 601-602 (licensed producers and processors may "wholesale" cannabis products).

[4] "[L]icensed dispensers and their employees, members, officers, and directors may deliver, distribute, dispense, transfer, prepare, package, repackage, label, relabel, **sell at retail**, or possess cannabis intended for medical use by qualifying patients ... ." (Emphasis added).

[5] Section 1202 further excluded certain documents from public disclosure under 42.56 RCW.

[6] "In order to assert an affirmative defense under this section, a cannabis producer or cannabis dispensary must: ... (b) In the case of dispensaries, solely provide cannabis to qualified patients for their medical use; (c) be registered with the secretary of state as of May 1, 2011; ...."

> The legislature amended MUCA in 2011. *See* LAWS OF 2011, ch. 181. But the bill the legislature passed differs significantly from the enacted law because Governor Gregoire vetoed 36 of the bill's 58 sections. *See id.* at 1374-76 (governor's veto message). As passed by the legislature, the bill would have created a comprehensive regulatory scheme under which all patients, physicians, processors, producers, and dispensers could be securely and confidentially registered in a database maintained by the Washington Department of Health. *See id.* § 901 (later vetoed).

Cannabis Action Coal., 183 Wn.2d at 223.

On April 14, 2011, the United States Attorneys for the Eastern and Western Districts of Washington wrote Governor Christine Gregoire to advise her of the federal government's position regarding the medical marijuana legislation. They did not mince words: The federal government would continue to enforce the federal controlled substances act, specifically as it applies to marijuana, despite the State's new statute.

> Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities.
>
> . . .
>
> As the Attorney General has repeatedly stated, the Department of Justice remains

> firmly committed to enforcing the CSA in all states.

CP 85-87. As a result, Governor Gregoire signed Engrossed Second Substitute Senate Bill 5073 only after vetoing many sections.

> Governor Gregoire vetoed all of the bill's sections that could have subjected state employees to federal charges, most importantly the establishment of the bill's centerpiece, the registration system. She did not veto the provision concerning collective gardens, RCW 69.51A.085 ... .

Cannabis Action Coal., 183 Wn.2d at 224. The Governor's veto completely removed all sections contemplating wholesale and retail sales, and so all commercial aspects for medical marijuana.

In her veto message, Governor Gregoire also acknowledged the validity of affirmative defenses or immunities. LAWS OF 2011, ch. 181, at 1374-76.

> Our state legislature may remove state criminal and civil penalties for activities that assist persons suffering from debilitating or terminal conditions.

Id. at 1374. She also

> remain[ed] open to legislation to exempt qualifying patients and their designated providers from state criminal penalties when they join in nonprofit cooperative organizations to share responsibility for producing, processing and dispensing cannabis for medical use.

Id., at 1376. And similarly: "I am not vetoing Sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider ... ." *Id.*

ii. *Surviving Amendments*

The surviving statute nonetheless provides for collective gardens:

> (1) **Qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use** subject to the following conditions: ... .
>
> (2) For purposes of this section, the creation of a "collective garden" means qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.

RCW 69.51A.085 (emphasis added).

> Nothing in this chapter or in the rules adopted to implement it precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use as authorized under RCW 69.51A.040.

Former RCW 69.51A.025;[7] LAWS OF 2011, ch. 181, § 413.

c. *Department of Revenue and MUCA*

Although the Governor vetoed all commercial aspects of ESSSB 5073, the Department of Revenue nonetheless issued special notices regarding taxes on medical marijuana collective gardens. CP 39-42.

> If collective or cooperating members are contributing things of value with an expectation of a benefit (e.g., receiving marijuana), the collective or cooperative is considered to be conducting business. It is required to register with Revenue, collect retail sales tax (on transactions with consumers) and send those taxes to Revenue.
>
> . . .
>
> Amounts received in exchange for tangible personal property (in this case, marijuana) are considered payment regardless of being characterized as "donations." (See RCW 92.04.040(1).) The sale (or providing for "donation") of marijuana is subject to retail sales tax under RCW 92.08.020.
>
> . . .
>
> Businesses selling medical marijuana are currently required to register with Revenue and collect and pay taxes, until the Legislature directs otherwise.

CP 41-42.

By specifically targeting medical marijuana collective gardens, DOR expanded its taxing

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[7] This section was repealed by LAWS OF 2015, ch. 70, § 48(2), effective 7/24/15.

authority. It effectively established a structure of licensing medical marijuana "businesses," requiring them to collect sales taxes for any "sale," and pay taxes as a retail business.

d. *Subsequent Legislation*

In 2013, the voters passed Initiative 502, a system for licensing and taxing[8] producers, processors, and retailers of recreational marijuana. *See* RCW 69.50.535 (excise taxes on each retail sale of marijuana).

In 2015, the Legislature again enacted, this time with the Governor's signature, the bulk of what was vetoed in 2011: commercial licensing for the manufacture, processing, wholesale and retail

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[8] "The people intend to stop treating adult marijuana use as a crime and try a new approach that:

"(1) Allows law enforcement resources to be focused on violent and property crimes;

"(2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and

"(3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.

"This measure authorizes the state liquor control board to regulate and tax marijuana for persons twenty-one years of age and older, and add a new threshold for driving under the influence of marijuana."

Initiative Measure No. 502, § 1.

sales of medical marijuana; and a "secure and confidential medical marijuana authorization database." LAWS OF 2015, ch. 70; SB 5052 (2015).

The new law specifically permits retailers to "provide marijuana at no charge, at their discretion, to qualifying patients and designated providers." Laws 2015, ch. 70, §§ 10, 11. The new law retains "collective gardens" until July 1, 2016, LAWS OF 2015, ch. 70, §§ 32, 49-50; then replaces them with "cooperatives" which qualifying patients or designated providers may form to "share responsibility for acquiring and supplying the resources needed to produce and process marijuana only for the medical use of members of the cooperative." Members "[m]ust provide assistance in growing plants. A monetary contribution or donation is not to be considered assistance." LAWS OF 2015, ch. 70, § 26.

Under the 2015 amendments, RCW 82.04.404 specifically will exempt medical marijuana from business and occupational taxes effective July 1, 2016. LAWS OF 2015, ch. 70, § 40.

3. NORTHERN CROSS COLLECTIVE GARDENS AND MARTIN NICKERSON, JR.

a. *Business License Applications*

On March 18, 2011, while the MUCA amendments bill was pending in the legislature, Martin Nickerson, Jr., filed two Master Business License Applications. One was for himself, the second was for Northern Cross Collective Gardens. It listed the company as a non-profit providing medical marijuana. It anticipated, under the pending legislation, retail sales. CP 93-100.

State law requires this license application to engage in any business in the state. RCW 82.32.030(1); RCW 82.32.290(1). ESSSB 5073 § 1201(3)(c) required existing dispensers to obtain such a registration by May 1, 2011. As noted above, the Governor subsequently vetoed the commercial aspects for dispensing medical marijuana, leaving only collective gardens.

b. *Criminal Charges*

On April 2, 2012, the State of Washington in Whatcom County charged Martin Nickerson, Jr., with multiple felony counts involving marijuana:

Counts I-V: delivery of marijuana;

> Counts VI-VIII: possession of marijuana with intent to deliver;
>
> Count IX: Maintaining a place for controlled substances (used for keeping or selling controlled substances);
>
> Count XI: Conspiracy to deliver marijuana.

The charged crimes allegedly occurred September 1, 2011 - March 15, 2012. CP 29, 34-37.

c. *Tax Assessments*

While these felony charges were pending, on November 13, 2013, DOR assessed excise taxes against Northern Cross Collective Gardens and Mr. Nickerson, per their certificates of registration, for the years 2011-2013 -- the same period in which his charged crimes were to have occurred. No tax returns had been filed. RCW 82.32.100 directs DOR to assess taxes against persons who fail to make any return, based on DOR's estimate of the tax obtained from "facts and information" in such manner as it may deem best. DOR initially assessed $6,188.19 against Mr. Nickerson, and $47,783.42 against Northern Cross, with no indication of how it arrived at those figures. The notice to Mr. Nickerson provided:

> The assessment will be adjusted to actual figures when you provide completed tax returns for all periods. If your account

> is selected for audit, the periods included in this assessment are subject to verification by an auditor.

CP 89, 102-03.

DOR's Combined Excise Tax Return requires a business to report "the gross income resulting from your Washington business activities." The return is filed with the business license registration number. CP 90, 121-23.

DOR only assessed taxes for plaintiffs' medical marijuana "sales." CP 251; RP(5/15/15) 30-31.

Mr. Nickerson attempted to negotiate a delay of the tax assessment, explaining his pending criminal charges and his right against self-incrimination under the Fifth Amendment and Article I, section 9. DOR declined to delay the assessment and collection. CP 29-31. Instead, DOR obtained tax warrants in the amounts of $7,152.66 and $55,016.95, filed them with the court to obtain a judgment, and seized Mr. Nickerson's bank account in the amount of $824.23. CP 30-31, 88-90, 105-11.

When the balance of the assessed taxes remained unpaid, DOR revoked the certificates of registration. CP 90, 118-19. Operating a business

after its certificate of registration has been revoked is a Class C felony. RCW 82.32.290(2).

4. PROCEDURAL HISTORY

Appellant brought this action to enjoin DOR from assessing and collecting taxes because it unconstitutionally compels him to provide incriminating evidence against himself. He also argued the federal Controlled Substances Act pre-empted the State's system of imposing sales and business taxes on collective gardens. By converting a collective garden to a retail business and assessing taxes on all transfers of the medicine among qualifying patients, the State of Washington created a commercial business market, in direct conflict with and an obstacle to the CSA's purpose of precluding any market or use of marijuana. CP 4-18, 19-27, 161-70; RP(2/20/15, 3/20/15, 5/15/15).

On cross-motions for summary judgment, CP 161-94, 277-13, the trial court dismissed the complaint. CP 248-53.

It concluded the State's tax statutes were not limited to marijuana transactions, and the CSA does not address state taxation. Comparing the

statutes, it concluded "the state law does not require that which the federal law prohibits," and so there was no pre-emption. CP 250-52.

As to the Fifth Amendment claim, DOR did not dispute plaintiff's claim that it is attempting to collect taxes on the same conduct with which he was criminally charged. CP 252-53. The court nonetheless concluded:

> Generally-applicable tax statutes and regulations that do not target selective or suspect groups are not subject to the Fifth Amendment privilege. Rather, the privilege applies in those cases where the government was targeting a particular group.

CP 252.

This appeal timely follows.

C. STANDARD OF REVIEW

The issues before this Court are purely issues of law. Interpretations of law are reviewed *de novo*. Grants of summary judgment also are reviewed *de novo*, and this Court engages in the same inquiry as the trial court. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

D. SUMMARY OF ARGUMENT

When a state law permits what a federal law prohibits, it is pre-empted; it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The CSA prohibits any possession, manufacture or distribution of marijuana for any purpose, and intends to prevent any market in the substance. The 2011 MUCA amendments permit collective gardens of medical marijuana and do not prohibit "private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use."[9] By deeming collective gardens to be businesses subject to licensing and taxation, DOR converted a non-commercial activity of a collective garden to a retail commercial activity, creating a medical marijuana market. Its system permitting and taxing collective gardens as businesses creates a commercial market in direct conflict with, and an obstacle to, the purpose of the federal Controlled Substances Act. Thus it is pre-empted by the CSA under the Supremacy Clause of the United States Constitution.

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[9] Former RCW 69.51A.025.

The tax statutes make tax returns reporting gross proceeds available to law enforcement and the U.S. Department of Justice. Requiring collective garden operators to file such returns violates the Constitutional privilege against self-incrimination. The business registrations specified Mr. Nickerson's intent to engage in retail sales of marijuana under pending legislation -- but those provisions were vetoed. The State later filed criminal charges against Mr. Nickerson for delivering marijuana. Any tax return for the "business" of the collective garden would involve an admission that marijuana had been delivered via the collective garden. It would thus provide the missing evidentiary link, creating a "real and appreciable hazard" of self-incrimination, in violation of the Fifth Amendment and Constitution, article I, section 9.

Because of these constitutional violations, this Court should reverse the lower court and enjoin DOR from collecting these taxes.

E. ARGUMENT

1. THE CONTROLLED SUBSTANCES ACT PRE-EMPTS DOR'S INTERPRETATION AND APPLICATION OF THE TAX LAWS TO MEDICAL MARIJUANA COLLECTIVE GARDENS.

a. *Federal Pre-Emption*

> This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land ..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Article VI.

> Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that "'[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case.' ... Congress may indicate a pre-emptive intent through a statute's express language or through its structure and purpose. ... Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. ...

Altria Group, Inc. v. Good, 555 U.S. 70, 76-77, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008) (citation omitted).

The CSA specifically addresses state law.

> **§ 903. Application of State Law.**
> No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless

> there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Conflict pre-emption occurs in one of two ways: either by "physical impossibility," or by "obstacle pre-emption."

> A state statute is void to the extent it conflicts with a federal statute -- if, for example, 'compliance with both federal and state regulations is a physical impossibility' ... or where the law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Maryland v. Louisiana, 451 U.S. 725, 747, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981) (citations omitted).[10]

To the extent a state statute authorizes or permits what a federal statute prohibits, it is pre-empted; it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners & Freezers Ass'n v. Agricultural Marketing &*

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[10] *Accord*: *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985); *Barnett Bank N.A. v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995).

Bargaining Bd., 467 U.S. 461, 478 & n.21, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984).

In *Michigan Canners*, a federal statute prohibited an agricultural producers' association from interfering with a producer's freedom to choose whether to bring his products to market himself or via a cooperative. A Michigan statute permitted associations to be certified as an exclusive bargaining agent for all producers of a particular commodity on a majority vote, which bound all producers of that commodity to pay a fee to the association and abide by its contract terms. The Court held the state law was pre-empted by the federal law.

> [B]ecause the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ... [T]o that extent, therefore, the Michigan Act is pre-empted by the AFPA ... .

Michigan Canners, 467 U.S. at 478. The Court elaborated in a footnote:

> Because the Michigan Act is cast in permissive rather than mandatory terms -- an association *may*, but need not, act as exclusive bargaining representative -- this is not a case in which it is impossible for an individual to comply with both state and federal law.

Id., n.21 (citations omitted, Court's emphasis).

Thus here the trial court applied the wrong legal test. CP 250-52. Obstacle pre-emption occurs when the state law permits what the federal law prohibits; the state law need not require the prohibited act.

b. *Congress Intended the CSA to Preclude All Marijuana Uses and Markets.*

The CSA establishes a comprehensive federal scheme to regulate the market in controlled substances. This

> closed regulatory system mak[es] it unlawful to manufacture, distribute, dispense, or possess any controlled substances except in a manner authorized by the CSA.

Gonzales v. Raich, supra, 545 U.S. at 13 (2005) (citing 21 U.S.C. §§ 841(a)(1), 944(a)).

> [T]he CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner.

Raich, 545 U.S. at 22.

> Marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market. ... [A] primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.

Raich, at 18.

To effectuate that "closed" system, the CSA "authorizes transactions [with controlled substances] within 'the legitimate distribution chain' and makes all others illegal." *United States v. Moore*, 423 U.S. 122, 141, 96 S. Ct. 335, 46 L. Ed. 2d 3333 (1975). However, the CSA completely forbids any "legitimate distribution chain" for Schedule I substances, including marijuana. *Raich, supra.*

c. *The CSA Pre-Empted the Oregon Medical Marijuana Act.*

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 348 Ore. 159, 230 P.3d 518 (2010), the Oregon Supreme Court held the CSA pre-empted Oregon's Medical Marijuana Act to the extent the state law affirmatively authorized the use of medical marijuana when the CSA forbids it.

> The Oregon Medical Marijuana Act affirmatively authorizes the use of medical marijuana, in addition to exempting its use from state criminal liability. Specifically, ORS 475.306(1) provides that "[a] person who possesses a registry identification card *** may engage in *** the medical use of marijuana" subject to certain restrictions. ORS 475.302(10), in turn, defines a registry identification card as "a document *** that identifies a person authorized to engage in the medical use

> of marijuana." Reading those two subsections together, we conclude that ORS 475.306(1) affirmatively authorizes the use of marijuana for medical purposes . . . .

Emerald Steel, 348 Ore. at 171.

The court considered the CSA provision regarding state law, § 903, *supra*.

> An actual conflict will exist either when it is physically impossible to comply with both state and federal law or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995), quoted with approval in *Emerald Steel*, 348 Ore. at 175.

> Because the "physical impossibility" prong of implied preemption is "vanishingly narrow," ... the Court's decisions typically have turned on the second prong of implied preemption analysis--whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Emerald Steel, 348 Ore. at 464 (citations omitted).

> [The Oregon Medical Marijuana Act] affirmatively authorizes the use of medical marijuana. The Controlled Substances Act, however, prohibits the use of marijuana without regard to whether it is used for medicinal purposes. As the Supreme Court has recognized, by classifying marijuana as a Schedule I drug, Congress has expressed its judgment that marijuana has no recognized medical use. *See Raich*, 545

> U.S. at 14. Congress did not intend to enact a limited prohibition on the use of marijuana -- *i.e.*, to prohibit the use of marijuana unless states chose to authorize its use for medical purposes. ... Rather, Congress imposed a blanket federal prohibition on the use of marijuana without regard to state permission to use marijuana for medical purposes. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 494 & n.7.
>
> **Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act.** ... To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in *Michigan Canners* did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, **state law stood as an obstacle to the enforcement of federal law in *Michigan Canners* because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case.**

Emerald Steel, 348 Ore. at 177-78 (emphases added).

The Oregon court distinguished between the portions of the statute that provided an affirmative defense, and those that affirmatively authorized use of marijuana.

> Congress lacks the authority to compel a state to criminalize conduct, no matter how explicitly it directs a state to do so. When, however, a state affirmatively authorizes conduct, Congress has the

> authority to preempt that law and did so here.

Emerald Steel, 348 Ore. at 186.

> [T]o the extent that ORS 475.306(1) authorizes the use of medical marijuana, the Controlled Substances Act preempts that subsection. ... [W]e do not hold that the Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability.

Id. at 190.

The pre-empted Oregon statute provided a person "may engage in medical use of marijuana." ORS 475.306(1). RCW 69.51A.085 provides qualifying patients

> may create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use ... .

The CSA thus equally pre-empts RCW 69.51A.085.

d. *Other State Drug Tax Laws Are Intended to Discourage Illegal Drug Use And So Do Not Conflict with the CSA.*

Various states have statutes that specifically tax illegal drugs.[11] Appellant has not located any

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[11] *See, e.g., Florida Dep't of Revenue v. Herre*, 634 So.2d 618 (Fla. 1994); *State v. Smith*, 120 Idaho 77, 813 P.2d 888 (1991); *State v. Durrant*, 244 Kan. 522, 769 P.2d 1174, *cert. denied*, 492 U.S. 923 (1989); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988); *State v. Garza*, 242 Neb. 573, 496

challenges to these statutes under federal pre-emption. Many of these statutes, however, were enacted as additional penalties for dealing in illegal drugs, not as an endorsement of the business or as a source of revenue. Thus they are completely consistent with the federal law's intent to criminalize dealing in controlled substances.

These statutes often are not enforced until a person is criminally charged for the drugs, either as an additional or alternative criminal penalty. Thus some have violated double jeopardy. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 780, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994) ("That the Montana Legislature intended the tax to deter people from possessing marijuana is beyond question.").

> Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed *despite* their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money. By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's

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N.W.2d 448 (1993); *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986); *State v. Hall*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997).

> benefits -- such as creating employment, satisfying consumer demand, and providing tax revenues -- are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.

Kurth Ranch, 511 U.S. at 782.

Since these types of statutes support and supplement the CSA's purpose in deterring and punishing illegal drugs they are not pre-empted.

e. *By Designating Collective Gardens as Retail Businesses and Taxing Them Accordingly, the State Creates a Marijuana Market System Pre-Empted by the CSA.*

As shown above, the CSA is intended to preclude any market in marijuana. Governor Gregoire considered that intent when she vetoed all commercial provisions of the 2011 MUCA amendments.

The Department of Revenue, however, chose to license and designate collective gardens as retail businesses -- despite the fact the Governor vetoed the retail aspects of the bill. It persisted to apply the tax laws to collective gardens as if they

were retail commercial enterprises, requiring they collect sales taxes and pay B&O taxes. It specifically targeted medical marijuana collective gardens as a source of revenue, CP 39-42, although the legislative history suggests they were not intended as commercial enterprises. Former RCW 69.51A.025.

To the extent the CSA pre-empts the MUCA, it also pre-empts the State from creating retail businesses by applying these tax laws to medical marijuana collective gardens.

The record of this case demonstrates DOR was not merely applying general business taxes to all businesses. The DOR specifically targeted collective gardens and deemed them to be retail businesses, subject to sales and B&O taxes. Requiring commercial behavior of a noncommercial entity greatly expanded the market nature of medical marijuana. Even if qualifying patients formed a collective garden and shared resources, reimbursing for costs, the DOR demanded taxes on the entity's gross income, including any "contributions" to the collective.

Thus the State not only permitted, but also expanded the scope of the statutory permission for collective gardens. It made them into commercial enterprises from which the State would benefit financially. These actions were in direct conflict and so an obstacle to the purposes of the CSA. They are therefore pre-empted by the federal law.

2. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION PREVENTS DOR FROM COMPELLING MR. NICKERSON TO FILE A TAX RETURN FOR GROSS INCOME FROM A MEDICAL MARIJUANA COLLECTIVE GARDEN.

a. *The Privilege Against Self-Incrimination*

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

United States Constitution, Amendment V.

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement -- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence.

Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).[12]

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[12] The same rights are guaranteed under the Washington Constitution, Art. I, §§ 3 and 9. *See* Appendix A.

This privilege against self-incrimination is available to a witness in a civil proceeding as well as to a defendant in a criminal prosecution. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977); *McCarthy v. Arndstein*, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

> The privilege afforded not only extends to answers that would in themselves support a conviction under a ... criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a ... crime. ... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Hoffman v. United States, 341 U.S. 479, 486-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Even if direct use of the compelled testimony itself would not be incriminating, the Fifth Amendment may be invoked if the compelled testimony would lead to the discovery of incriminating evidence. *Doe v. United States*, 487 U.S. 201, 208 n.6, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).

The DOR demands a tax return in connection with Mr. Nickerson's business registrations, which stated his intent to provide medical marijuana. CP 121-23, 88-100. Mr. Nickerson is under prosecution for delivering marijuana, inter alia. CP 34-37.

RCW 82.32.330 provides in relevant part:

> (2) Returns and tax information are confidential and privileged, and **except as authorized by this section**, neither the department of revenue nor any other person may disclose any return or tax information.
>
> (3) **This section does not prohibit the department of revenue from:**
>
> (g) **Disclosing any such return or tax information to a peace officer as defined in RCW 9A.04.110 or county prosecuting attorney, for official purposes.** The disclosure may be made only in response to a search warrant, subpoena, or other court order ... .
>
> ...
>
> (i) **Disclosing any such return or tax information to the United States department of justice ... for official purposes**; ... .

There can be no question that any gross income on the tax return, combined with the business registrations, would be evidence tending to incriminate him for purposes of that criminal prosecution, as well as many federal crimes: an acknowledgement that he had received funds for providing marijuana.

i. *Supreme Court Cases: "A Real and Appreciable Hazard"*

In *United States v. Sullivan*, 274 U.S. 259, 47 S. Ct. 607, 71 L. Ed. 1037 (1927), the Court held the government may require a general income tax return even for income from illegal activity. The general income tax return did not identify the source of the funds; thus no real and appreciable hazard of incrimination arose. But the Court also held the defendant could invoke the Fifth Amendment for any particular information on the return that would tend to incriminate him. *Id.* at 263-64.

In *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968), and *Grosso v. United States*, 390 U.S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 96 (1968), the Court held the Fifth Amendment privilege was a complete defense to charges of failing to register a wagering business and failing to pay taxes on it. Unlike the return required in *Sullivan*, where "most of the return's questions would not have compelled the taxpayer to make incriminating disclosures," the anti-wagering statute made every element of the registration and tax return incriminating. *Id.* at 50-51.

> The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers. We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful.
> ...
> The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities. See 26 U.S.C. § 6107. This has evidently been the consistent practice of the Revenue Service.

Id. at 58-59.

In response to the government's argument that the defendant had no "constitutional right to gamble," the Court noted:

> The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself.

Marchetti, 390 U.S. at 51.

The *Marchetti* Court considered whether the obligations to register and pay the occupational tax created "for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." 390 U.S. at 48.

> Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant "link in a chain" of evidence tending to establish his guilt. Unlike the income tax return in question in *United States v. Sullivan*, 274 U.S. 259, every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner ... .

390 U.S. at 48-49. *See also Haynes v. United States*, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968) (statute requiring registration of prohibited firearms could lead directly to prosecution for possessing illegal arms; violated Fifth Amendment).

In *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), the Court similarly invalidated a federal marijuana tax act because it violated the Fifth Amendment, exposing Dr. Timothy Leary to "a real and appreciable hazard" of prosecution under state and local drug laws. The statute imposed an annual occupational tax on all persons who "deal in" marijuana. The taxpayer had to register his name and place of business with the IRS. Any transfer of marijuana

had to be done with a written order form containing the name and address of the transferor and transferee, their registration numbers, and the quantity of marijuana transferred. The transferee had to provide that information to obtain an order form. The transfer tax was due when obtaining the order form. The statute "assures that the information contained in the order form will be available to law enforcement officials." It made it a crime to acquire, transport, or conceal marijuana without having paid the tax.

> If read according to its terms, the Marihuana Tax Act compelled petitioner to expose himself to a "real and appreciable" risk of self-incrimination, within the meaning of our decisions in *Marchetti*, *Grosso*, and *Haynes*. Sections 4741-4742 required him, in the course of obtaining an order form, to identify himself not only as a transferee of marihuana but as a transferee who had not registered and paid the occupational tax under §§ 4751-4753. Section 4773 directed that this information be conveyed by the Internal Revenue Service to state and local law enforcement officials upon request.
>
> Petitioner had ample reason to fear that transmittal to such officials of the fact that he was a recent, unregistered transferee of marihuana "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" under the state marihuana laws then in effect.

Leary, 395 U.S. at 16.

In *Marchetti* and *Grosso*, the Government urged the Court to uphold the anti-wagering taxation statute by interpreting it to restrict law enforcement's use of the taxpayer's information. *Marchetti*, 390 U.S. at 58-59; *Grosso*, 390 U.S. at 69. The Court declined to so modify the law. Congress later took exactly that step, prohibiting the IRS from releasing tax return information to law enforcement. This amendment removed the "real and appreciable" hazard of incrimination. *United States v. Appoloney*, 761 F.2d 520, 523 (9th Cir. 1985).

ii. *State Cases*

State cases have reached the same conclusion regarding their licensing and tax laws.

In *People v. Duleff*, 183 Colo. 213, 515 P.2d 1239 (1973), the court reversed a conviction for unlawfully cultivating marijuana without a license. A Colorado statute required a license to grow marijuana. To obtain a license, one had to provide one's identity, and satisfy the department one had good moral character, appropriate equipment for the business, and a clean criminal record.

> [T]he Fifth Amendment prohibits licensing requirements from being used as a means

> of discovering past or present criminal activity which is subject to prosecution by calling attention to the licensee and his activities. The focus of attention in licensing cases such as this one is directed toward the substantiality of the risk of prosecution and conviction, rather than the chronology of the acts which are in issue. The relevant question is not whether the initial decision to produce marijuana is voluntary, but whether, once that decision has been made, the accused may be compelled to incriminate himself by complying with the licensing requirements. ...
>
> Under the circumstances of this case, in order to fully comply with the requirements [of the state licensing law], Duleff would have been forced to reveal information which would have tended to incriminate him of violating the federal marijuana tax laws. ... There is no doubt that the information which Duleff would have been required to disclose would have been useful to the investigation of his activities, would have substantially increased the risk of prosecution, and may well have been a direct admission of guilt under federal law.

Duleff, 183 Colo. at 218 (citations omitted). *Accord*: *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986) (statute licensed and taxed marijuana; tax return information may be disclosed to law enforcement; statute violated Fifth Amendment); *State v. Smith*, 120 Idaho 77, 79, 813 P.2d 888 (1991) (state acknowledged 1989 version of tax

stamp act violated Fifth Amendment because permitted disclosure and use of information).

In *Florida Department of Revenue v. Herre*, 634 So.2d 618 (Fla. 1994), the Florida Supreme Court held the state's income tax statute for marijuana transactions violated the Fifth Amendment. The State argued the tax return did not require disclosure of the taxpayer's occupation or the nature of his business. But it required the taxpayer to state his gross sales, pay 50% tax on any illegal drug sale, and sign the return. The Florida Supreme Court held this information "provides a link in the chain of incriminating evidence." Furthermore, the confidentiality provisions were undermined by requiring the department to provide tax returns to law enforcement upon a subpoena or court order.

> [A] statutory grant of immunity is not coextensive with the privilege against self-incrimination unless it grants "use immunity, or protection from the direct use of compelled incriminatory information, but also derivative-use immunity, which prohibits use of any such information for investigatory purposes leading to other evidence of criminal activity."

Herre, 634 So.2d 618, 621, *quoting State v. Durrant*, 244 Kan. 522, 769 P.2d 1174, 1183, *cert. denied*, 492 U.S. 923 (1989).[13]

In *State v. Hall*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997), the Wisconsin Supreme Court held

> because the [drug tax] stamp law fails to protect against the derivative use, in a criminal proceeding, of information it compels, it violates the privilege against self-incrimination and is therefore unconstitutional.

Id. at 64. The Wisconsin statute required "dealers" of illegal drugs to purchase tax stamps for drugs in their possession and to affix the stamps to the drugs.[14] The statute prohibited the department of revenue from requiring dealers to identify themselves, and prohibited release of any information obtained in administering the tax. Wis. Stat. § 139.91. Nonetheless, by affixing the stamps to the drugs, as the law required, the

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[13] *See also*: *Sisson v. Triplett*, 428 N.W.2d at 568 (under Minnesota Marijuana and Controlled Substance Tax Act, any information supplied to Dep't of Revenue "cannot be disclosed and its use in a criminal proceeding is barred").

[14] A "dealer" was anyone illegally in possession of more than 7 grams of a Schedule I or II controlled substance. Failure to pay the required tax was a felony. Former Wis. Stat. § 139.87-.96; *id.* at 61-63, n.1.

dealer demonstrated he knowingly and intentionally possessed a particular quantity of unlawful drugs--an element of a drug possession charge. This information was available for criminal prosecution once the drugs were seized, without recourse to information the department of revenue gathered. *Hall*, 207 Wis. 2d at 75. The court held the statute unconstitutional.

The Wisconsin legislature amended the statute to provide derivative use immunity:

> No information obtained from a dealer as a result of the dealer's compliance with this subchapter may be used against the dealer in any criminal proceeding.

This language resolved the Fifth Amendment problem. *State v. Jones*, 257 Wis. 2d 319, 340-41, 651 N.W.2d 305 (Wis. App. 2002).[15]

> The effectiveness of the confidentiality provision is the essential element in our self-incrimination analysis.

State v. Garza, 242 Neb. 573, 579, 496 N.W.2d 448 (1993).

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[15] *Accord*: *Sisson v. Triplett*, 428 N.W.2d at 568, 573 (statute prohibited disclosing or using any DOR information in a criminal proceeding; statute upheld); *State v. Smith*, *supra*.

b. *Washington's Excise Taxes on Medical Marijuana*

The trial court here concluded the generally-applicable tax statutes did not target suspect groups, and so "are not subject to the Fifth Amendment privilege." CP 252. This conclusion is error.

The cases discussed above all involved specialized tax statutes targeted at specific illegal activity, with the intent of deterring and further punishing that activity. Such a statute incorporates an intent to pursue criminal behavior, and so a "real and appreciable" risk of prosecution.

Washington's excise tax statutes are not themselves aimed at specific suspect activity. Nonetheless, on this record the DOR specifically targeted medical marijuana collective gardens. Thus although the Legislature did not design the tax laws to gather self-incriminating information, DOR's application to this specific group of "businesses" obtains the same unconstitutional effect. As applied to medical marijuana collective gardens, Washington's excise tax laws provide exactly the "real and appreciable" hazard of

incrimination by making all such returns available to law enforcement, just as in *Marchetti*, *Grosso*, and *Leary*. RCW 82.32.330.

Even if the state intended collective gardens to be a lawful business under state law, providing medical marijuana via collective gardens is a crime under a multitude of criminal statutes. *Marchetti*, 390 U.S. at 47. The activity arguably supports charges of possession, possession with intent to distribute, distribution, manufacturing, conspiracy, and maintaining a property for purposes of drugs. 21 U.S.C. §§ 841(a), 856; 18 U.S.C. § 2; RCW 69.50.401(1)-(2)(c), 69.50.402(1)(f), 69.50.407; RCW 9A.38.040.

Indeed, these are the statutes under which Mr. Nickerson now faces criminal prosecution -- irrefutable proof of a "real and appreciable" risk.

The tax laws require a business application to disclose the nature of the business, the identity of the person in charge, and the address. Mr. Nickerson's application indicated a collective garden to provide medical marijuana. The law then requires a tax return indicating the gross income of the business and listing the registration

number. This information would prove a "significant 'link in a chain' of evidence tending to establish his guilt" of the criminal charges.

The remaining question is whether "he might reasonably suppose [this information] would be available to prosecuting authorities." *Marchetti*, 390 U.S. at 48. RCW 82.32.330 clearly makes it available. Without any provision for confidentiality or immunity, the statute applied here violates the Fifth Amendment.

c. *Seizing Assets and Cancelling a Business License Unless One Waives the Fifth Amendment Privilege is an Improper Compulsion.*

> [G]overnment cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. ... [T]he touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

Lefkowitz v. Cunningham, 431 U.S. at 806. Thus the Court has held the State cannot compel waiving the privilege under threat of losing one's means of

making a living,[16] or losing an unpaid but prestigious and influential political office.[17]

In response to Mr. Nickerson's invocation of his Fifth Amendment privilege, the DOR assessed taxes against him, seized his bank account, and canceled his certificate of registration. His only recourse, other than this action, is to file a tax return, which would waive his privilege.

Seizure of his property as a penalty for invoking his privilege is an unconstitutional compulsion. Canceling his certificate of registration is the equivalent of depriving him of his livelihood -- if he conducts any business after it is cancelled, he will be guilty of a felony.[18]

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[16] *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (police officers); *Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968) (sanitation workers); *Lefkowitz v. Turley*, 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) (architects with state contracts); *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) (attorney disbarred for invoking privilege).

[17] *Lefkowitz v. Cunningham, supra* (removal from unpaid political office and ban from holding any political office for five years).

[18] **82.32.290. Unlawful acts -- Penalties.** (1)(a) It is unlawful:

DOR's actions therefore compel Mr. Nickerson to provide self-incriminating evidence. This violation of the Fifth Amendment invalidates the DOR's tax assessment.

F. CONCLUSION

The trial court applied an incorrect test for federal pre-emption. Under the proper test, the CSA pre-empts RCW 69.51A.085 and DOR's taxation of medical marijuana collective gardens.

Requiring tax returns for medical marijuana collective gardens compels self-incriminating evidence, violating the Fifth Amendment.

This Court should reverse the trial court, vacate the tax assessment, and enjoin DOR from

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> (i) For any person to engage in business without having obtained a certificate of registration as provided in this chapter;
>
> ...
>
> (b) Any person violating any of the provisions of this subsection (1) is guilty of a gross misdemeanor ...
>
> (2)(a) It is unlawful:
>
> (i) For any person to engage in business after revocation of a certificate of registration unless the person's certification of registration has been reinstated;
>
> ...
>
> (b) Any person violating any of the provisions of this subsection (2) is guilty of a class C felony ....

collecting such taxes from Mr. Nickerson and his businesses.

DATED this 12th day of October, 2015.

Respectfully submitted,

DOUGLAS HIATT
WSBA No. 21017

LENELL NUSSBAUM
WSBA No. 11140

Attorneys for Appellant

APPENDIX A

> **§ 9. Rights of Accused Persons.** No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Constitution, Article I, § 9.

> **§ 3. Personal Rights.** No person shall be deprived of life, liberty, or property, without due process of law.

Constitution, Article I, § 3.

DECLARATION OF SERVICE

On this date, I caused a copy of the attached document to be served on the following parties by agreed electronic service, addressed as follows:

Mr. Cameron Comfort
CamC1@atg.wa.gov

Ms. Kelly Owings
Kelly02@atg.wa.gov

Mr. Jeffrey Even
JeffE@atg.wa.gov

Attorney General
revolyef@atg.wa.gov

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

10·12·2015 · SEATTLE, WA
Date and Place

ALEXANDRA FAST

OFFICE RECEPTIONIST, CLERK

To: Alexandra Fast; CamC1@atg.wa.gov; kelly02@atg.wa.gov; jeffE@atg.wa.gov; revolyef@atg.wa.gov; douglas@douglashiatt.net; Lenell Nussbaum
Subject: RE: Martin Nickerson, Jr. vs. Washington State Department of Revenue et al - 91883-0

Rec'd 10/12/2015

Supreme Court Clerk's Office

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Subject: Martin Nickerson, Jr. vs. Washington State Department of Revenue et al - 91883-0

Please accept for filing the attached "Brief Appellant" in regards to Martin Nickerson, Jr. vs. Washington State Department of Revenue et al. A certificate of service is attached to the pleading.

Alexandra Fast
Assistant to:
Lenell Nussbaum, Attorney at Law
Email: Nussbaum@seanet.com
WSBA No. 11140
Lenell Nussbaum, Attorney at Law
2125 Western Ave., Suite 330
Seattle, WA 98121
USA
Phone: 206-728-0996
Fax: 866-496-5644